



Law Society
of Scotland

Written evidence

Land Reform (Scotland) Act 2016 (Register of
Persons Holding a Controlled Interest in Land)
(Scotland) Regulations 2021

August 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Property Law Committee and Property and Land Law Reform sub-committee welcome the opportunity to consider and respond to the Environment, Climate Change and Land Reform Committee's call for views on the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) (Scotland) Regulations 2021 (the Regulations). We have the following comments to put forward for consideration.

General comments

We note concerns about the widespread nature of the proposed duties and the impact of these duties on a potentially wide range of individuals and bodies. There appears to be no differentiation between for example, a local sports club and a large commercial organisation, or between small family partnerships and major pension fund trusts.

There is a lack of comprehensive information about trust or partnership property available on public registers, and so there is no ability to produce a proper estimate of how many properties, or people, are likely to be affected by requirements of the Regulations. It cannot therefore be ascertained if the effect may be disproportionate to any benefit.

It appears to us that, often, without legal advice or some more formal determination, owners may be unwilling or unable to establish if they are affected yet may be liable to, inadvertently, commit a criminal offence. As explained below, we believe that it is likely that offences under the proposed Regulations may be committed unintentionally, by individuals who are not seeking to hide anything. We would question whether the offences are proportionate, particularly when balanced against wider policy aims to ensure that Scotland is a good place to do business.

We consider that there are a number of provisions which would benefit from clarity and provide comment on these matters below.

It is important that there is a clear exclusion of any extension of the Regulations to the role of "trusted adviser" often held by professional advisers, being those persons giving advice in a paid professional capacity. In addition, we note that we do not consider it would be appropriate for solicitors to require to certify those who hold a controlling interest.

Specific comments

"Controlled" or "Controlling"

The Regulations use the expression "controlled" (Title; Regulation 3 and elsewhere) and occasionally "controlling". We consider that clarification is required on this point as it is open to different interpretation.

We understand the purpose of the Register is to seek to identify those who have control over decision making in land and therefore use of the expression "controlling" may be most appropriate as being the correct characterisation of the interest of an associate. "Controlled" means someone who is under the control or influence of another, or is supervised or governed by them; "controlling" means the person who supervises, governs or regulates. The Register is of persons who can supervise, govern or regulate.

It would appear to be unnecessary to hold details of the controlled persons as those people are either an owner or a tenant under a long lease, and their details are therefore already recorded or registered in one of the property registers.

In addition, it may be of assistance to extend the definition of "control" (as referred to in Regulation 2) to incorporate the concepts of "controlled" and "controlling" in order to clarify that different interpretations of the concepts are not expected.

Definitions of control and influence (Regulation 2(2) and para 22 of Explanatory Document)

We recommend further thought be given to the definitions of "control" and "significant influence". We consider that there would be merit in the Explanatory Document being expanded in relation to the types of circumstances in which there is to be considered that "control" or "significant influence" exists or will arise.

In Regulation 2(2)(a), we are of the view that the expression "direct the activities of another" is open to wide interpretation, and could easily apply to situations which are not intended to be caught by the Regulations. We appreciate that this wording, and the wording referred to below, reflect wording used in the provisions relating to the Register of People with Significant Control (PSC) under the Companies Act 2006. There is statutory guidance to accompany these requirements of the PSC regime, with examples of where the requirements would be established.

We are of the view that the Explanatory Document should be expanded to make clear what situations are envisaged by this wording, if it is to be maintained. While generally there is merit in consistency of definitions across legislation, consideration should be given to the differentiation in the wording that it may be necessary to make, given the stated purpose of this Register. We recommend that this be considered carefully to ensure that there are no unintended consequences flowing from this and the other expressions used in these definitions.

We consider that Regulation 2(2)(c) is equally open to uncertainty, and could potentially extend to the role of "trusted adviser" often held by professional advisers. It should be made clear that this does not apply to persons giving advice in a paid professional capacity. While paid professional advisers are excepted from the definitions of associates in partnerships, trusts, unincorporated bodies and overseas entities in Schedule 1, the effect of the qualification "only" ("where that person's relationship to the [entity] is only that of paid professional adviser") is uncertain. The statutory guidance for the PSC regime excludes from categories of those deemed to be exercising significant control "[persons providing] advice or direction in a professional capacity" such as lawyers, accountants, tax advisers, financial advisers and others. We suggest this or similar expression should be adopted in the Regulations.

Clarification of what is meant or intended by the expressions "able to ensure" and "adopt the approach that the person desires" is required. In the context of the Regulations, it would appear that these matters should be tied into the making of business decisions about the land, and the ability arising due to the business relationship.

We would submit that adopting much of the language and terminology of the PSC regime may be misguided: the purpose of the Regulations is quite different from that of the PSC Register, and the terminology should reflect that, and take account of the principal objective of the Regulations.

Details of recorded person (Regulation 3)

It should be sufficient that the recorded person's address be that of the property in question, or a contact address at which they are able to be reached, such as a business address. For privacy reasons, we do not consider it appropriate for a recorded person to be required to give their home address.

Timing of making or amending an entry (Regulation 5)

We consider that there may be merit in imposing a time limit on when the Keeper must make or amend an entry in the Register, so that those inspecting the Register will have certainty about the state of the accuracy of, and reliance on, the information in the Register. For example, if there was a requirement that the entry or amendment had to be made within 60 days of a submission being made, persons inspecting the Register would know that it was accurate to within that margin. A consistent timescale for making

entries or amendments would help to ensure that there is the increased transparency which the Regulations seek to establish.

Protection of and access to the Register (Regulations 6 and 7)

Given the nature of the information that the Register will hold, it is essential that there are robust security and protection measures in place. We note that the standard referred to in the Regulation "[a]s appear reasonable to the Keeper" is not a recognisable independent standard. While the Keeper, as custodian of a number of public registers, exercises a high standard of security from interference and unauthorised access, we recommend that Regulation 6 should make it clear that the highest standards of security of the system are expected.

The Regulations should provide that anyone who suffers loss or damage, whether actual, financial or reputational, from a security breach of the Register, or an error in its contents, should be compensated.

Paragraphs 42 and 43 of the Explanatory Document imply that Regulation 7 sets out the criteria for persons to have access to the Register, but the wording of Regulation 7 leaves this to the discretion of the Keeper, so it is not clear whether, how, and to what extent access will be controlled or restricted. We anticipate that those who will be submitting information to the Register will want to know how their information can be accessed – will the Register operate in the same way as ScotLIS, for example, which has a free to access public platform for certain types of information, and a business platform, access to which must be by registered users, which provides more detail?

We consider that the Explanatory Document should be enhanced to contain more information on this, and other, regulations, rather than merely explaining in plain language what the Regulation says. Section 42 of the Land Reform (Scotland) Act 2016 requires that the Explanatory Document must give reasons for the provisions contained in the regulations. We consider that such explanations would enhance users' understanding of the requirements of the Register.

Persons to whom the Regulations apply

We consider that there should be more detailed and clearer guidance on the persons to whom the Regulations do not apply. The paragraphs in the Explanatory Document relating to Regulation 8(2), (and also the Regulation itself) should be expanded to clarify the types of owner or tenant who are exempt from the Regulations, in addition to those subject to other transparency regimes. It should be clear on the face of the Regulations to whom they apply, without having to read the whole Regulations to work out that they do not.

While we appreciate it may be difficult to provide an exhaustive list, a large number of property owners and tenants who are not affected by these Regulations could have that fact set out clearly, for example:

- individuals who own or rent and occupy their own home;
- that a non-entitled spouse or non-entitled civil partner is not an associate (as arguably, the definition of associate in paragraph 1(b) of Schedule 1 Part 1 could be interpreted as applying to them);
- partners in partnerships, where all of the partners are individuals and all hold title or are tenants under the lease (where there is no non-partner individual exercising control);
- trustees in trusts, where all of the other trustees are individuals and all hold the titles or are tenants under the lease (where there is no non-trustee individual exercising control).

It is appreciated that for a person to be able to establish that there is no non-partner or non-trustee individual exercising control, some investigation or conscious personal interrogation may be required. We believe, however, that it would add considerable clarity and simplification to the Regulations if the categories of persons (other than Schedule 2 exempt bodies) to whom the Regulations do not (at a given time) apply, were to be detailed. This would be subject to the possibility that those categories of persons could come within the ambit of the Regulations at some point in the future, if a new partner or trustee, who was not an owner or tenant, was assumed.

We are concerned at the potential difficulties in identifying associates in unincorporated bodies. Such bodies, such as sports clubs or local community groups, may not have any formal constitution, and the "general control and management of administration of the body" may not necessarily vest in the same person or people all of the time, but may be assumed from time to time by different individuals on an ad hoc basis.

One area where we perceive difficulties arising is in cases where title to a property is held by trustees *ex officio*, where the property has been owned for many years and the relevant office holders are unaware of the role they have assumed in holding title.

The Explanatory Document highlights some of the difficulties in identifying relevant parties. It would be of benefit if it were to offer suggestions and solutions for identifying the relevant personnel that have to be disclosed and provide that it is a reasonable excuse for not registering a person as an associate if the current "holder" of an *ex officio* position cannot be located.

Given the declared intention of the UK Government to enact legislation creating a Register of Beneficial Owners of Overseas Companies and other legal entities which will apply to the whole of the UK and for that register to be operational in 2021, we recommend that consideration is given as to how overseas entities are to be included in these current arrangements. This could be dealt with by including such entities at this stage but including in the Regulations a provision that they will no longer be subject to the

requirements of the Register when the Register of Beneficial Owners of Overseas Companies comes into effect. At the time of writing, a consultation on the proposals for the UK Register is ongoing.

Details of associate (Regulation 9)

It should be sufficient that the associate's address be that of a contact address at which they are able to be reached, such as a business address. For privacy reasons, a recorded person should not be required to give their home address. We appreciate that there may be some merit in also requiring an email address or contact telephone number to be provided.

Offences and defences

There is concern that many individuals to whom these regulations are to apply will fail to comply with the various duties and requirements innocently and inadvertently. Since failure to comply with any of the requirements under the Regulations is a criminal offence attracting a potentially substantial fine, we consider that it is important to recognise the potential that the majority of offences that will be committed are likely to be in this category. It is entirely just that persons should be penalised for giving false or misleading information, or seeking to withhold key facts or subvert the purpose of the Register however it may be disproportionate to criminalise individuals for being owners or tenants of land and innocently failing to provide information due to a lack of awareness. We suggest that account needs to be taken of mitigating circumstances, such as ignorance of the existence of an associate, and indeed ignorance of the requirement to register details of an associated person.

We note that the requirements to update information at the time of changes, for example, when there are changes to the make-up of a partnership or changes to the trustees in a trust, may be considered fairly onerous.

For example, Regulation 8(8) suggests that it would be a reasonable excuse to be unable to establish the existence of any associates, after having taken reasonable steps to do so, but many individuals will not necessarily know that they have to take these reasonable steps in the first place. It is important that legislation gives individuals effective guidance as to the necessary standards of conduct and therefore it is important that individuals know about and can understand the requirements upon them.

We suggest that a requirement be introduced that, before an offence is deemed to have been committed, the individual concerned is given a period of time, after receiving notification from the Keeper that they have failed to comply with any of the duties under the Regulations that attract a penalty, to comply with the duty, and only after failure to comply within a reasonable period after notification should it be possible for an offence to be committed.

Security Declaration (Regulations 8 and 14 - 16)

Given the critical nature of the circumstances in which a person will need or want to make a security declaration, we consider that it is vital that the opportunities for making a security declaration are given the highest priority in the registration process. We are concerned that, as currently drafted, there are potential gaps in the process where a vulnerable individual's details may be publicly available on the Register, before that individual has had the opportunity to make a security declaration to the Keeper.

The specified form for the information that is to be supplied to the Keeper under Regulation 8(3) must contain a declaration from the responsible person that they have taken the steps required to notify the associate of the requirements under Regulation 8(4) that the associate may make a security declaration. If none accompanies the specified form, the information must be provided that the person submitting the form knows of no reason why the associate would need to make a security declaration, or, that the associate has confirmed that it does not intend to make a security declaration.

The information to be supplied to the associate under Regulation 8(4) must clearly inform the associate that its details will be made available in a public register, and that the security declaration, if appropriate, must be made within the 60 day timescale for submission of the particulars of the associate to the Register, failing which their details will be in the public realm.

If the form with details of the associate has to be submitted before the security declaration is available, the Keeper should be required to treat the matter as though the security declaration had been received, and not publish the associate's details for a specified period of time, to allow the associate to complete and submit the security declaration. There is a danger that even if the vulnerable associate's details are exposed on the register for even a short period of time, they may be susceptible to risk of violence or abuse.

The decision as to acceptability of the security declaration appears to be at the discretion of the Keeper. We consider that there requires to be clear and thorough guidelines for this process, and we would suggest the default position should be that the declaration is to apply, rather than not. Victims of abuse, intimidation, or threat may find it difficult to obtain sufficient evidence in a short period of time, and yet be no less at risk. It is essential that the requirements of a register which is about providing transparency of ownership and a means for communities to engage with landowners about the use and management of land must not cause harm to individuals at risk.

For the same reasons consideration should be given to some flexibility in relation to the revocation provisions in Regulation 15(2)(b).

Any referral to the Lands Tribunal for an appeal against a decision not to accept a security declaration, must be considered on a confidential basis and any decisions either not published, or published with personal information redacted.

Individual culpability (Regulation 20)

We note this Regulation includes references to directors and other officers of limited companies, and to members of Limited Liability Partnerships. These entities are exempt from the Regulations but appear to be subject to Regulations 12, 13 and 18. We consider it likely that many of these “exempt” entities will think that the Regulations do not apply to them at all, particularly as they are subject to another regime and are therefore, in theory at least, already fully disclosed. We consider that this is another area which may give rise to inadvertent breaches of the Regulations.

Notification of Keeper on event of death, winding up or dissolution (Regulation 21)

It is of concern that the failure of an executor to notify the Keeper of the death of an individual who is a recorded person or an associate is to be a criminal offence. The winding up of an individual's estate generally deals with the personal assets of that individual. The executor may have no knowledge of the deceased's business affairs. The existence of the deceased's details on the Register may be unknown to the executor. We consider that there would be merit in considering the terms of this Regulation, particularly in relation to the creation of an offence, in light of the likely circumstances that will apply in many cases.

In relation to the duties of a person winding up an entity which is a recorded person or associate, we note that the entities affected by this provision may be most likely to be overseas entities. This raises the question of enforceability of the sanctions for failure to disclose, and the difficulties of recovery of fines.

For further information, please contact:

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